

## **Section 6**

### **The Expert Witness Problem— Separating Science from Science Fiction**

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# Common Factors Used in Selecting the Expert

Below are the factors in matrix chart form,  
which the attorney looks for when selecting the  
expert.

<b>COST</b>	<b>APPEARANCE</b>	<b>LOCATION</b>
<b>RESULTS</b>	<b>CREDENTIALS</b>	<b>COMMUNICATION</b>
<b>RESPONSIVENESS</b>	<b>ADAPTABILITY</b>	<b>EXPERIENCE</b>



# The most commonly used civil trial Experts

- Torts-45%
- Civil Rights-23%
- Contract-11%
- Intellectual Property-10%
- Labor-2%
- Prisoner Rights-2%
- All others-7%

**Source-Federal  
Judicial Center**  
2000 Study



# Judicial Reasons for Excluding Expert Testimony

- Testimony not relevant-45%
- Witness not qualified-42%
- Testimony would not assist trier of fact-40%
- Facts or data in Expert report not reliable-22%
- Prejudicial nature of testimony outweighed its probative value-21%
- Methods and principals not reliable-18%

Source: Federal Judicial Center



## The *Daubert* Case-509 U.S. 579 (1993)

- Supreme Court held, in interpreting FED. R. EVID. 702 that an expert's opinion will be admissible;
- if the expert is qualified,
- if the expert have used a reliable method to reach the opinion, and
- if the proffered opinion is relevant to issues in the case at hand.



# Daubert Factors

- **Testing**
  - Has the theory been tested or can it be tested?
- **Peer Review**
  - Has the theory been subject to peer review and publication?
- **Error Rate**
  - Is there a known or potential rate of error with the technique?
- **Acceptability**
  - Are there known standards and does the technique enjoy general acceptance in the scientific community?



# *Daubert* Factors

- The Court becomes the gatekeeper and has the discretion to determine how to apply the Daubert factors
- The Court must consider all of the Daubert factors, but failure to consider one or more of the factors is not an abuse of discretion
- The Court may consider other factors besides the Daubert factors to determine the reliability of the proffered testimony



# *Kuhmo* Expansion

- The Judge is the Gatekeeper
  - for all expert opinions, not just those based upon scientific knowledge
  - for all legal opinions dressed up like scientific opinions
- Judge will only be reversed in excluding expert where there has been a manifest abuse of discretion
- Trend is toward exclusion of “unqualified” expert testimony



# The Expert Checklist-Common Issues

- Rule 702
- Does the Expert's Testimony relate to scientific, technical, or other specialized matters?
- Is the proposed testimony relevant and material to the issue being tried?
- Will the proposed opinion testimony assist the trier of fact?



# The Expert Checklist-Common Issues

- Judicial Trend is to look closely at Experts Qualifications and how they relate to the Issue being tried.
  - Is the Expert qualified to testify, based upon knowledge, skill, experience, training, or education?
  - The Expert must have at least one of “special information” skill to assist the trier of fact.
  - Qualifications alone are not dispositive. Courts cannot rely on the *ipse dixit* of the Expert.



# The Expert Checklist-Common Issues

- Methodology
  - Are the proposed opinions based on generally accepted methodology?
  - Has the Methodology been tested and subject to publication and a peer review
  - Is the Methodology subject to any known standards and are there known acceptable error rates from those standards?
  - Is the Methodology reliably applied?



# The Expert Checklist-Common Issues

- The Proffered Opinion
  - Is it based on specific facts related to the issue being tried?
  - Is it based on reliable supporting data that are commonly used by experts in a particular field?
  - Has the expert addressed alternative theories and analyzed them under the facts of the case?
  - Does the expert's opinion reasonably extrapolate from the facts using the methodology to the conclusion reached?



# The Trend-More Expert Disqualification

- Federal Judicial Study (2000) compared expert disqualification to 1991 similar study
  - Only civil trial data compared
  - Judges allowing expert testimony dropped from 75% in 1991 to 60% in 1999
  - Results may be understated because only trial data was compared and many expert issues are decided by pre-trial motions and summary judgement



# The Trend-More Expert Disqualification

- Federal Judicial Study (2000)
- Most common experts-Medical, Engineering, Financial, and Other Science.
- Two main problems for judges
  - Experts abandon objectivity and become advocates.
  - High cost of expert testimony.
- 60% more likely to have a pre-trial *Daubert* hearing today.



# Badal, Slizewski 2001 Study of Post *Daubert* Economic Expert Disqualification

	Case	Date	Reason Given
1.	<b><i>Blue Dane Simmental Corp. v. American Simmental Assoc.</i>, 178 F.3d 1035 (8<sup>th</sup> Cir. 1999).</b>	6/2/99	8 <sup>th</sup> Circuit rules damage expert qualified but testimony excluded because too simplistic and ignored independent variables.
2.	<b><i>In re Brand Name Prescription Drugs Antitrust Litigation</i>, 186 F.3d 781 (7<sup>th</sup> Cir. 1999).</b>	7/13/99	7 <sup>th</sup> Circuit affirms that liability expert's testimony properly excluded on relevance grounds.
3.	<b><i>In re Independent Service Organizations Antitrust Litigation</i>, 114 F. Supp. 2d 1070 (D. Kan. 2000).</b>	2/16/00	U. S. District Court for the District of Kansas excludes declarations of liability experts because not qualified and methodology was not tested.



# Badal, Slizewski 2001 Study of Post *Daubert* Economic Expert Disqualification

	Case	Date	Reason
4.	<b><i>Concod Boat v. Brunswick</i>, 207 F.3d 1039 (8<sup>th</sup> Cir. 2000).</b>	3/24/00	8 <sup>th</sup> Circuit excludes liability expert's testimony because he ignored relevant data and issues.
5.	<b><i>Virginia Vermiculite v. W. R. Grace</i>, 98 F. Supp. 2d 729 (W.D. Va. 2000).</b>	5/4/00	U. S. District Court for the Western District of Virginia, Charlottesville, excludes liability expert's testimony because not qualified and methodology and opinions rife with error.
6.	<b><i>Seatrax v. Sonbeck International</i>, 200 F.3d 358 (5<sup>th</sup> Cir. 2000).</b>	6/25/00	5 <sup>th</sup> Circuit excludes damage expert's testimony because not qualified.



# Recent Criminal Expert Disqualification

- *U.S. v. Plaza*, E.D. Pa. #98-362-10- Fingerprint Expert disqualified on issue of matching fingerprints to defendant.\* (Rehearing held 4/25/02 at government request. Evidence admitted.)
- Expert testimony of a match of fingerprint evidence fails to meet reliability standards suggested by the first three Daubert factors.
- No universal fingerprint standard. Pattern recognition used by FBI (ACE-V) not reliable.



# Conclusion

- Trial attorney must pay close attention to the selection of expert
- Experts should be hired early and vetted often
- Expert must have the right qualifications to meet the facts of the case
- Early examination of methodology, analysis of issues and opinions drawn is critical